

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MYRON JORDEN,

Defendant-Appellant.

UNPUBLISHED

December 18, 2001

No. 225962

Wayne Circuit Court

Criminal Division

LC No. 98-008144

Before: Cooper, P.J., and Cavanagh and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions on two counts of first-degree criminal sexual conduct, MCL 750.520b, and one count of felonious assault, MCL 750.82. We affirm.

Defendant first argues that the prosecutor committed misconduct by making disparaging remarks about defendant, defense counsel, and the defense theory during closing argument. Because defendant failed to object to the challenged remarks at trial, we review this issue for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Claims of prosecutorial misconduct are decided case by case. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). We review the prosecutor's remarks in context to determine whether the comments deprived the defendant of a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267, nn 5-7; 531 NW2d 659 (1995); *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

Here, the challenged remarks were made during rebuttal argument and were largely responsive to defense counsel's closing argument. Where a prosecutor's comments are responsive, they must be considered in light of the defense arguments raised. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Otherwise improper remarks may not result in error requiring reversal where the remarks are made in response to defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Further, while prosecutors have a duty to see to it that a defendant receives a fair trial, prosecutors may use "hard language" when it is supported by the evidence and they are not required to phrase their

arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

A prosecutor is prohibited from personally attacking a defendant's trial attorney during closing arguments because such remarks can infringe upon the defendant's right to be presumed innocent. *Kennebrew*, *supra* at 607. A prosecutor may also not suggest that defense counsel intentionally attempted to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). Here, viewed in context, it is apparent that the challenged remarks did not constitute a personal attack on defense counsel. The prosecutor did not argue that defense counsel was intentionally lying to the jury or attempting to mislead it but, rather, that the defense theory itself was not worthy of belief. Such argument is not improper. See *People v Howard*, 226 Mich App 528, 544-545; 575 NW2d 16 (1997). The comments were not personally disparaging of defense counsel, but were directed at the credibility of the defense's claims. *Id.* A prosecutor is free to argue that a witness, including the defendant (or the defense theory), is not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Therefore, defendant has not shown that plain error resulted from the comments.

Next, defendant argues that trial counsel was ineffective for failing to object to the previously discussed remarks by the prosecutor during closing argument, and for failing to seek suppression of a cellular telephone that was seized at the time of defendant's arrest. Because this issue was not raised in the trial court, we limit our review to errors apparent on the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

In order for this Court to reverse due to ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there was a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr.*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

First, consistent with our analysis of defendant's first issue, we conclude that counsel was not ineffective for failing to object to the prosecutor's remarks during rebuttal argument. Second, the record indicates that the telephone was seized by a police officer at the time defendant was arrested. Although defendant contends that the officer did not have probable cause to seize the telephone, an officer may conduct a search incident to a lawful arrest. *People v Houstina*, 216 Mich App 70, 75; 549 NW2d 11 (1996). An officer making an arrest can search the area within the suspect's immediate reach for weapons and evidence. *Id.* The officer may also search the person arrested and seize any evidence found to prevent its concealment or destruction. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 529-530; 560 NW2d 651 (1996). A search of a suspect incident to arrest does not require further justification. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). Here, the telephone was in defendant's possession when it was seized during his arrest after being identified as the person who sexually

assaulted the victim. Therefore, we conclude that defense counsel was not ineffective for failing to seek suppression of the telephone.

Next, defendant argues that reversal is required because the oath administered to the jury at the beginning of trial was improper. Because defendant did not object to the oath as given, we review this issue for plain error that affected defendant's substantial rights. *Carines, supra*.

In this case, when the trial judge's preceding comments are read together with the oath administered by the court's clerk, it is apparent that the oath substantially complied with MCR 2.511(G). The substance of the oath administered served its purpose of informing the jurors that they were to pay attention to the evidence, judge the credibility and demeanor of the witnesses, and conduct themselves at all times consistent with the important role they were serving. See *People v Pribble*, 72 Mich App 219, 224-225; 249 NW2d 363 (1976). The oath that was administered was sufficient to protect defendant's fundamental right to a trial by jury. *Id.* at 224. Moreover, the oath prescribed by MCR 2.511(G) controls over that set forth in MCL 768.14, since this involves a matter of practice and procedure. *Staff v Johnson*, 242 Mich App 521, 530-531; 619 NW2d 57 (2000). Thus, plain error has not been shown.

Defendant next argues that the trial court erred in instructing the jury on "reasonable doubt." Once again, because defendant did not object to the court's instructions at trial, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra*. The record reveals that the court instructed the jury in accordance with CJI2d 3.2(3). That instruction sufficiently conveyed the concept of reasonable doubt to the jury. See *People v Snider*, 239 Mich App 393, 420-421; 608 NW2d 502 (2000); *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999); *People v Hubbard (After Remand)*, 217 Mich App 459, 487-488; 552 NW2d 493 (1996). Consequently, defendant has not shown plain instructional error.

Finally, in light of the foregoing, we reject defendant's claim that the cumulative effect of several errors deprived him of a fair trial. See *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Jane E. Markey